TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 278.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SIMON J. MESCALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 31, 1908.

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1 Circuit Court of the United States of America for the Eastern District of New York.

At a stated term of the Circuit Court of the United States of America for the Eastern District of New York, begun and held in the Boro' of Brooklyn, city of New York, within and for the district aforesaid, on the sixth day of January, in the year nineteen hundred and eight, and continued by adjournment to and including the 20th day of January, in the year nineteen hundred and eight.

EASTERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, within and for the district aforesaid, upon their oath present that the steamship "Alice" arrived at the port of New York, in the United States of America, to wit, at the Boro' of Brooklyn, in the county of Kings and in the Eastern District of New York, on the second day of November, in the year nineteen hundred and seven, from a foreign country, to wit, Greece, and that the said steamship "Alice" had on board eighty cases of cheese, marked S D S 81/160, brought by the said steamship from Greece aforesaid, and consigned to one S. D. Stamatopoulos, and that upon the arrival of the said steamship at the port of New York the said eighty cases of cheese were unloaded from said New York, the said eighty cases of cheese were unloaded from said steamship and stored at the Bush Terminal Stores, South Brooklyn, in the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, and an invoice and entry thereof were filed with the collector of customs at the port of New
2 York, as required by law and the rules and regulations of the Treasury Department of the United States, by the said S. D. Stamatopoulos, being entered by the said S. D. Stamatopoules with other merchandise imported on the same steamship "Alice" under entry No. 289762, warehouse bond No. 60490; that upon the importation of the said cheese as aforesaid, specific duties upon the same then and there became due and payable to the said United States, estimated upon the weight thereof;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that Simon J. Mescall, on the first day of November, in the year nineteen hundred and seven, and on all the days and times between that date and the twentieth day of November, in the year nineteen hundred and seven, was a person other than the owner, importer, and consignee, and a person other than the agent of the owner, importer, and consignee, of the hereinbefore mentioned merchandise, that is to say, he, the said Simon J. Mescall, was on the first day of November, in the year nineteen hundred and seven, and on all the days and times between that date and the twentieth day of November, in the year nineteen hundred and seven, an assistant weigher of the United States, in the customs service of the United States, at the port of New York, and on the fifth and sixth days of November, in

the year nineteen hundred and seven, was engaged in the performance of his duties as such assistant weigher at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, in weighing the said eighty cases of cheese so imported as aforesaid, and that it was on the days last aforesaid and at
3 the place last aforesaid the duty of the said Simon J. Mescall then and there to weigh correctly the said eighty cases of cheese and to make return to the collector of customs at the port of New York of the correct number of pounds which the said cheese then and there weighed, and that upon the said weights, so returned by the said Simon J. Mescall as aforesaid, the said entry was to be liquidated and the duties upon the said cheese finally ascertained by the said collector of customs;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Simon J. Mescall, late of the Boro' of Brooklyn, the county of Kings, and Eastern District of New York, on the sixth day of November in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York and within the jurisdiction of this court, did then and there knowingly, wilfully, and unlawfully make and attempt to make an entry of imported merchandise, to wit, the said eighty cases of cheese by means of a false and fraudulent practice, by means whereof the United States was to be deprived of the lawful duties and a portion thereof accruing upon the said merchandise embraced and referred to in the invoice of said merchandise which had theretofore been brought into the United States by the said steamship "Alice," and entered by the said S. D. Stamatopoulos with other merchandise imported on that same steamship under entry No. 289762, warehouse bond No. 60490, filed with the collector of customs; that is to say, that the said Simon
4 J. Mescall, on the said sixth day of November, in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, did then and there knowingly, wilfully, and unlawfully and in disregard of his duty return to the said collector of customs at the port of New York as the weight of the said eighty cases of cheese thirteen thousand three hundred and fifty-eight pounds, gross weight, tare two thousand seven hundred pounds, net weight ten thousand six hundred and fifty-eight pounds; and upon the said net weight of ten thousand six hundred and fifty-eight pounds the said entry was to be liquidated by the said collector and the duties due to the United States were to be finally ascertained by the said collector, whereas, in truth and in fact, and as he, the said Simon J. Mescall, well knew at the time he so made said return of the weights of the said eighty cases of cheese as aforesaid, the true net weight thereof and the weight upon which the said entry should be liquidated and upon which the said duties due the said United States should be ascertained by the said collector, was seventeen thousand five hundred and seventy-seven pounds, and the grand jurors aforesaid do therefore

present that by reason of the premises aforesaid, that is to say, the said aforementioned false and fraudulent return of the said weights as hereinbefore specifically set forth, the said Simon J. Mescall, on the said sixth day of November in the year nineteen hundred
5 and seven, at the Boro' of Brooklyn, in the Eastern District of New York and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully make and attempt to make an entry of imported merchandise, to wit, the eighty cases of cheese hereinbefore mentioned, by means whereof the United States were to be deprived of the lawful duties accruing upon the said merchandise and a portion thereof embraced and referred to in said invoice theretofore filed with the collector of customs at the port of New York, as hereinbefore set forth, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the steamship "Alice" arrived at the port of New York, in the United States of America, to wit, at the Boro' of Brooklyn, in the county of Kings, and in the Eastern District of New York, on the second day of November, in the year nineteen hundred and seven, from a foreign country, to wit, Greece, and that the said steamship "Alice" had on board eighty cases of cheese, marked S D S 81/160, brought by the said steamship from Greece aforesaid, consigned to one S. D. Stamatopoulos, and that upon the arrival of the said steamship at the port of New York the said eighty cases of cheese were unloaded from said steamship and stored at the Bush Terminal Stores, South Brooklyn, in the Boro' of Brooklyn, in
6 the Eastern District of New York, and within the jurisdiction of this court, and an invoice and entry thereof were filed with the collector of customs at the port of New York, as required by law and the rules and regulations of the Treasury Department of the United States, by the said S. D. Stamatopoulos, being entered by the said S. D. Stamatopoulos with other merchandise imported on the same steamship, "Alice," under entry No. 289762, warehouse bond No. 60490; that upon the importation of the said cheese as aforesaid, specific duties upon the same then and there became due and payable to the said United States, estimated upon the weight thereof;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that Simon J. Mescall, on the first day of November, in the year nineteen hundred and seven, and on all the days and times between that date and the twentieth day of November, in the year nineteen hundred and seven, was a person other than the owner, importer, and consignee, and a person other than the agent of the owner, importer, and consignee, of the hereinbefore mentioned merchandise, that is to say, he, the said Simon J. Mescall, was on the first day of November, in the year nineteen hundred and seven, and on all the

days and times between that date and the twentieth day of November, in the year nineteen hundred and seven, as assistant weigher of the United States, in the customs service of the United States, at the port of New York, and on the fifth and sixth days of November, in the year nineteen hundred and seven, was engaged in the per-
7 formance of his duties as such assistant weigher at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, in weighing the said eighty cases of cheese so imported as aforesaid, and that it was on the days last aforesaid, and at the place last aforesaid, the duty of the said Simon J. Mescall then and there to weigh correctly the said eighty cases of cheese and to make return to the collector of customs at the port of New York of the correct number of pounds which the said cheese then and there weighed, and that upon said weights, so returned by the said Simon J. Mescall as aforesaid, the said entry was to be liquidated and the duties upon the said cheese finally ascertained by the said collector of customs;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Simon J. Mescall, late of the Boro' of Seven, at the Boro' of Brooklyn, in the Eastern District of New York, on the sixth day of November, in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, was then and there guilty of a wilful act and omission, by means whereof the United States was to be deprived of the lawful duties and a portion thereof accruing upon the merchandise and a portion thereof embraced and referred to in said invoice, filed with the collector of customs as aforesaid, to wit, the merchandise entered by the said S. D. Stamatopoulos under entry No. 289762, warehouse bond No. 60490, and the in-
8 voice of said merchandise, filed with the collector of customs; that is to say, that the said Simon J. Mescall, on the said sixth day of November, in the year nineteen hundred and seven, at the the jurisdiction of this court, did then and there knowingly, willfully, and unlawfully, and in disregard of his duty, return to the said collector of customs at the port of New York as the weight of the said eighty cases of cheese thirteen thousand three hundred and fifty-eight pounds, gross weight, tare two thousand seven hundred pounds, net weight ten thousand six hundred and fifty-eight pounds; and upon the said net weight of ten thousand six hundred and fifty-eight pounds the said entry was to be liquidated by the said collector and the duties due to the United States were to be finally ascertained by the said collector, whereas in truth and in fact, and as he, the said Simon J. Mescall, well knew at the time he so made said return of the weights of the said eighty cases of cheese as aforesaid, the true net weight thereof and the weight upon which the said entry should be liquidated and upon which the said duties due the said United States should be ascertained by the said collector, was seventeen thousand five hundred and seventy-seven pounds; and the grand

jurors aforesaid do therefore present that by reason of the premises aforesaid, that is to say, the said aforementioned false and fraudulent return of the said weights as hereinbefore specifically set forth, the said Simon J. Mescall, on the said sixth day of November, in the year nineteen hundred and seven, at the Boro' of Brooklyn, in
9 the Eastern District of New York, and within the jurisdiction of this court, was then and there guilty of a wilful act and omission, by means whereof the United States was to be deprived of the lawful duties and a portion thereof accruing upon the merchandise and a portion thereof embraced and referred to in the invoice, filed with the collector of customs as aforesaid, to wit, the merchandise entered by the said S. D. Stamatopoulos under entry No. 289762, warehouse bond No. 60490, and the invoice of said merchandise filed with the collector of customs at the port of New York, as hereinbefore set forth, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the steamship "Alice" arrived at the port of New York in the United States of America, to wit, at the Boro' of Brooklyn, in the county of Kings, and in the Eastern District of New York, on the second day of November in the year nineteen hundred and seven, from a foreign country, to wit, Greece, and that the said steamship "Alice" had on board eighty cases of cheese, marked S D S 81/160, brought by the said steamship from Greece aforesaid, consigned to one S. D. Stamatopoulos, and that upon the arrival of the said steamship at the port of New York, the said eighty cases of cheese were unloaded from said steamship and stored at the
10 Bush Terminal Stores, South Brooklyn, in the Boro' of Brooklyn, in the Eastern District of New York and within the jurisdiction of this court, and an invoice and entry thereof were filed with the collector of customs at the port of New York, as required by law and the rules and regulations of the Treasury Department of the United States, by the said S. D. Stamatopoulos, being entered by the said S. D. Stamatopoulos with other merchandise imported on the same steamship "Alice" under entry No. 289762, warehouse bond No. 60490; that upon the importation of the said cheese as aforesaid, specific duties upon the same then and there became due and payable to the said United States, estimated upon the weight thereof;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Simon J. Mescall, on the first day of November in the year nineteen hundred and seven, and on all the days and times between that date and the twentieth day of November in the year nineteen hundred and seven, was a person other than the owner, importer, and consignee, and a person other than the agent of the owner, importer, and consignee, of the hereinbefore mentioned mer-

chandise, that is to say, he, the said Simon J. Mescall, was on the first day of November in the year nineteen hundred and seven, and on all the days and times between that date and the twentieth day of November in the year nineteen hundred and seven, an assistant weigher of the United States, in the customs service of the United
11 States, at the port of New York, and on the fifth and sixth days of November in the year nineteen hundred and seven, was engaged in the performance of his duties as such assistant weigher at the Boro' of Brooklyn, in the Eastern District of New York and within the jurisdiction of this court, in weighing the said eighty cases of cheese so imported as aforesaid, and that it was on the days last aforesaid and at the place last aforesaid, the duty of the said Simon J. Mescall then and there to weigh correctly the said eighty cases of cheese and to make a written return and a written statement to the collector of customs at the port of New York of the correct number of pounds which the said cheese then and there weighed, and that upon the said weights, so returned by the said Simon J. Mescall and so reported by the said Simon J. Mescall in the said written return and written statement as aforesaid, the said entry was to be liquidated and the duties upon the said cheese finally ascertained by the said collector of customs;

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Simon J. Mescall, late of the Boro' of Brooklyn, the county of Kings and Eastern District of New York, on the sixth day of November in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York and within the jurisdiction of this court, did then and there knowingly, wilfully, and unlawfully make and attempt to make an entry
12 of imported merchandise, to wit, the said eighty cases of cheese, imported as hereinbefore set forth and included in entry No. 289762, warehouse bond No. 60490, be means of a false written statement, that is to say, that the said Simon J. Mescall, on the said sixth day of November in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, did then and there knowingly, wilfully, and unlawfully and in disregard of his duty make a written return and false written statement to the said collector of customs at the port of New York that the weight of the said eighty cases of cheese was thirteen thousand three hundred and fifty-eight pounds, gross weight, tare two thousand seven hundred pounds, net weight ten thousand six hundred and fifty-eight pounds, which said net weight of ten thousand six hundred and fifty-eight pounds, so returned as aforesaid by the said Simon J. Mescall in the said false written statement, was the weight upon which the said entry was to be liquidated by the said collector and the duties due to the United Sates were to be finally ascertained by the said collector whereas, in truth and in fact, and as he, the said Simon J. Mescall, well knew at the time and place he so made said false written statement and written return of the weights of the said eighty cases of cheese as

aforesaid, the said written statement and written return was false, and the said net weight of ten thousand six hundred and fifty-eight pounds contained in the said written statement and written return was false, and the true net weight of the said eighty cases of
13 cheese and the weight which the said Simon J. Mescall should have returned in the said written statement and the weight upon which the said entry should be liquidated and upon which the said duties due the said United States should be ascertained by the said collector, was seventeen thousand five hundred and seventy-seven pounds, and the grand jurors aforesaid do therefore present that by reason of the premises aforesaid and by means of the said false written statement and return as hereinbefore specifically set forth, the said Simon J. Mescall, on the said sixth day of November in the year nineteen hundred and seven, at the Boro' of Brooklyn, in the Eastern District of New York, and within the jurisdiction of this court, did then and there knowingly, wilfully and unlawfully make and attempt to make entry of the said imported merchandise, to wit, the said eighty cases of cheese hereinbefore described, by means whereof the United States was to be deprived of the lawful duties accruing upon the said merchandise and a portion thereof, to wit, the lawful duties upon six thousand nine hundred and nineteen pounds of said cheese, being the difference between the true net weight of said cheese and the net weight reported by the said Simon J. Mescall in said false written statement, as aforesaid, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided.

WM. J. YOUNGS,
United States Attorney for the Eastern District of New York.

14 [Endorsements.]

United States Circuit Court, Eastern District of New York. Calendar No. 753. The United States of America vs. Simon J. Mescall. Indictment No. 3. Sec. 9, ch. 407, laws of 1890. William J. Youngs, United States attorney, Federal Building, Boro' of Brooklyn, New York City, N. Y. A true bill. Wm. C. Cass, foreman. Filed January 20, 1908.

February 13, 1908, defendant arraigned.

Plea not guilty with leave to demur.

February 18, 1908, demurrer filed.

February 28, 1908, demurrer argued; decision reserved.

May 7, 1908, opinion filed; demurrer sustained.

June 2, 1908, order entered extending term.

July 28, 1908, order entered sustaining demurrer, &c.

August 29, 1908, petition for writ of error and assignment of errors filed; writ of error received and filed.

August 31, 1908, citation received and filed.

15 United States Circuit Court, Eastern District of New York.

THE UNITED STATES OF AMERICA *against* SIMON J. MESCALL.	Indictment under sec. 9, ch. 407, laws of 1890.

And now comes Simon J. Mescall in his own proper person in the court, and, having heard the said indictment read, says: That the said indictment and each and every count thereof and the matters therein contained in the manner and form as the same are stated and set forth are insufficient in law, and that he, the said Simon J. Mescall, is not bound by the law of the land to answer the same, and that he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said Simon J. Mescall prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictments specified.

And for special causes of demurrer to the said indictment the said Simon J. Mescall shows to the court the following; that is to say:

1. That the said indictment does not nor do any of the counts thereof state facts sufficient to constitute a crime under section 9, chapter 407, of the laws of 1890.

16 2. That the said indictment does not nor do any of the counts thereof charge the defendant with any crime under section 9, chapter 407, of the laws of 1890.

3. That the said indictment and all the allegations contained therein, and each and every count thereof, are insufficient to charge and do not charge any offence by the defendant against the laws of the United States, and defendant demurs to the said indictment and to each of the separate counts in said indictment upon the ground, among others, that a mistatement, false statement, or incorrect statement of weights in the invoice and entry mentioned in said several counts does not constitute a crime.

4. That the said indictment and each and every of the counts thereof is insufficient to charge and does not charge the defendant with any crime, and defendant demurs to said indictment and to each and every of the said counts separately and severally on the ground, among others, that it is not alleged or shown therein that the goods therein described were actually withdrawn from the customs bonded warehouse, whereby the United States was deprived of the lawful duties or any portion thereof.

5. That the said indictment and each and every count thereof is insufficient to charge and does not charge the defendant with any crime, and defendant demurs to said indictment and to each and every count thereof separately and severally, on the ground, among others, that the acts alleged to have been performed by the defendant were performed subsequently to the entry of the goods as described in the said indictment and the several counts thereof and contemplated by the statutes.

7 6. That the said indictment and each and every count thereof is insufficient to charge and does not charge the defendnt with any crime, and defendant demurs to the said indictment and ach and every count thereof, upon the ground, among others, that it ppears upon the fact thereof that the acts of the defendant in no way aade the entry or tended to make the entry of the merchandise herein described and contemplated by the statutes.

7. That the said indictment and each and every count thereof is nsufficient to charge and does not charge the defendant with any rime, and defendant demurs to the said indictment and each and very count thereof, upon the ground, among others, that it is not hown or alleged therein that less than the lawful duties were paid pon the merchandise therein described because of defendant's alleged cts, whereby the United States was deprived of some part of the awful duties thereon.

8. That the said indictment and each and every count thereof does ot allege the offence therein and thereby intended to be alleged and harged in words in themselves fully, directly, and expressly without ncertainty and ambiguity setting forth all the elements necessary to onstitute the offence therein intended to be charged and alleged, and he defendant therefore demurs to the same.

9. That the said indictment does not in any way apprise the defendnt with clear and reasonable certainty of the actual and precise ature of the accusation and charge against him, nor with sufficient certainty and clearness to enable the defendant to properly pre-
8 pare his defence thereto, and to interpose and plead a judgment thereon as a bar to any subsequent persecution for the same ffence, and the defendant therefore demurs to the said indictment nd each and every count thereof.

And this defendant prays that each of the said specifications herenbefore set forth may be taken as if separately made under several demurrers to each of several respective counts in the said indictnents and to the demurrer to the indictment as a whole, the same s if repeated as many times as would be required to make each of aid specifications apply to said indictment as a whole and separately o each of the several counts thereof.

EUGENE F. O'CONNOR, Jr.,
Of Counsel and Attorney for defendant Simon J. Mescall.

EASTERN DISTRICT OF NEW YORK,
County of Kings, ss:

Simon J. Mescall makes solemn oath and says that he is the above named defendant, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

SIMON J. MESCALL.

Subscribed and sworn to before me this 18th day of February, 1908.

FRANKLIN TAYLOR,
Commissioner of Deeds for City of New York, residing in the Borough of Brooklyn.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EUGENE F. O'CONNOR, Jr.,
Of Counsel and Attorney for defendant Simon J. Mescall.

(Endorsed:) Demurrer to indictment. Filed February 18, 1908.

19 United States Circuit Court, Eastern District of New York.

THE UNITED STATES OF AMERICA
vs.
SIMON J. MESCALL.

MAY 7, 1908.

William J. Youngs, United States attorney.

Eugene F. O'Connor, jr., for defendant Mescall; Leo Oppenheimer, of counsel.

CHATFIELD, J. Each of these indictments is brought under section 9 of chapter 407, of the laws of 1890, which forbids the making or attempting to make an entry of imported merchandise by means of any false or fraudulent practice or appliance, false statement, or false paper, etc.

Each indictment consists of more than one count, based upon different provisions of the same statute, and all are alike in the fundamental idea that they charge the defendant, who is stated to be a weigher in the customs service of the United States, with having made, and having attempted to make, entry of certain cheese by means of false statements and papers and practices.

20 The basis of the charge is an accusation that, after the importer had entered his goods in the custom-house, the defendant made a false return of the weights to the collector of customs, for the purpose of having the liquidation of the entry made upon the basis of that false weight, and thus causing the amount of duty exacted to be less than that which should be paid upon the correct weight of the importation.

Section 9 of the customs administrative act is a modified reenactment of certain provisions which have long been embodied in the Revised Statutes. The original provision was contained in section 66 of the act of March 2, 1799, 1 Stat. at Large, 677.

In 1863, chapter 76 becoming a law upon March 3d of that year, was enacted and furnished a more or less comprehensive statute with relation to the importation of merchandise, and the duties of importers and of officials of the Government with relation thereto. Section 1 of this law, in connection with various other provisions, contained substantially the language of the first portion of section 9 of the laws of 1890. Section 3 of that act contained substantially similar provisions to those now embodied in section 5445 of the Revised Statutes, and section 4 provisions substantially similar to those of section 5444 of the Revised Statutes. Upon the compilation of the Revised Statutes of the United States in 1874 the various provisions

of the act of 1863 were carried into the revision, and in 1890 that portion of section 1 of the law of 1863 above referred to was
21 put into a separate section, a paragraph added imposing a criminal penalty upon the person making the false entry, and a phrase inserted in the civil portion of the section, requiring the fraud to be one "by means whereof the United States shall be deprived of lawful duties." An inspection of these various statutes and of the accompanying provisions of the law of 1863 would justify the interpretation that the word "entry," in the act of June 10, 1890, and in the preceding acts, referred to the filing of the written paper called the "entry," with the collector of the port, and that any false statement, document, or appliance used in the making or attempting to make the entry, must accompany the entry at the time of its filing, or be used as a part of the transaction prior to the receipt of the paper entry by the collector. In fact, the law of 1863, immediately after the words referred to, provides for the performance of certain acts by the collector, immediately upon the making of such entry, and that duty shall not be finally liquidated until certain papers have been received "provided that such liquidation shall not be delayed longer than eighteen months from the time of making such entry."

The words "such entry," as has been said, occur frequently throughout the act, and in each place are capable of the above interpretation. Such an interpretation would make it impossible to sustain this indictment, which charges the examiner or weigher with making a false "entry" by furnishing a false statement of weight for the purpose of liquidation, subsequent to the filing and
22 acceptance by the collector of the paper called the "entry," and the completion of that step in the transaction.

But these provisions, now contained in section 9, have been differently interpreted in this circuit, and while the decision, perhaps, was not necessary to a determination of the particular case, it would seem to be the law of this circuit that the word "entry," in section 9 of the customs administrative act, refers to the entire transaction of passing the goods through the custom-house, and hence includes the various steps, among which is the return of a statement of the weights with respect to goods subject to a specific duty upon weight.

The question was first considered by Judge Blatchford in the case of United States v. Baker, 5 Ben. 25 Fed. Cas., 14,500. In charging a jury under almost precisely similar circumstances, Judge Blatchford said: "The word 'entry' in the first section of the act of 1863 * * * means not only the entry specified in the preceding part of that section, but any entry so called in custom-house language * * *. There is an entry for warehouse, such as was the original entry in this case * * *. There is a withdrawal entry, as there was in this case * * *. For the purposes of the clause which I have read to you, inflicting this forfeiture, the word 'entry' means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the United

States." Judge Blatchford goes on to say that "any false practice or any false appliance * * * previous to the liquidation
23 and the payment of duties may work a forfeiture and be within the provisions now contained in sec. 9." Judge Blatchford then charged that any bribing of a weigher, with intent to procure a false return, would come within the provisions of this section.

This seems to be the only positive interpretation of these particular words. In the case of United States v. Legg, 105 Fed., 930, the Circuit Court of Appeals for this circuit, referring to the word "entry," in section 2785 of the Revised Statutes, said: "The term 'entry' in the acts of Congress is used in two senses. In many of the acts it refers to the bill of entry, the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction, a series of acts which are necessary to the end to be accomplished, viz, the entering of the goods." (Hoffman, J., in U. S. v. Cargo of Sugar, 3 Sawy., 46, Fed. Cas. No. 14722.) That case was a prosecution under a statute providing a penalty "if any owner or consignee of goods shall knowingly make or attempt to make an entry thereof by means of any false invoice or false certificate * * * or of any other false or fraudulent practice or appliance whatsoever." Manifestly, the word "entry," in such statute, referred to the entire transaction of passing the goods through the custom-house. To the same effect is U. S. v. Baker, 5 Ben. 251, Fed. Cas. No. 14500.

It may be noted that Judge Hoffman, in his charge in the
24 sugar case, supra, interpreted the word "entry" as covering a series of acts, but did not extend that series of acts beyond the completion of the filing of the paper commonly known as an "entry." But however this may be, the approval of the Circuit Court of Appeals, and the language used by Judge Blatchford, make it necessary to hold that the transaction prohibited by section 9 of the laws of 1890 may occur at any time in connection with the entering of goods into the United States through the custom-house.

Under this interpretation of the section, the act of the defendant in this case would be held to be one upon which forfeiture could be based, upon which the value of the goods, if they could not be forfeited, might be collected from the person making the entry, and upon which a prosecution of that person might be had.

The defendant, however, has demurred to these indictments upon the additional ground that section 9 applies to no person except one who can be considered as within the class of "owners, importers, consignees, agents." It is argued that no "assistant weigher" in the customs service can be brought within this class, without construing the words "other person" to mean "any person whatever." This is an unnecessary attempt at straining the construction of the statute. An assistant weigher or any individual who came within the scope of the provisions of the section, in the sense of making or attempting

to make an entry, would certainly be within the class of "owners, importers, consignees, agents, and other persons" referred to in the statute.

25 Nor is it necessary to consider the further objection which is urged, that no actual deprivation of duty to the United States is shown. The decision of this court, in the recent case of U. S. v. Half Cases of Cheese and 59 Cases of Figs, may be assumed to set forth the allegations which would be considered necessary to show a deprivation of duty upon which forfeiture or prosecution could be had.

But it is apparent from the allegations of the indictment, that the defendant is not in fact any of the persons within the contemplation of section 9, with relation to these particular importations, and cannot be considered either an owner, importer, consignee, agent, or other person.

The defendant Mescall was not making or attempting to make an entry of these goods. According to the charge he was, contrary to his duty, rendering assistance to the importer, who was the "person" making the entry. The statute does not provide for the case of all individuals who may assist, or have a fraudulent part in the making of an entry (in either sense of the word) by some other person. In fact, in the recent case of U. S. v. One Silk Rug, decided by the Circuit Court of Appeals in the Third Circuit (Treasury Decisions 28799), section 9 has been held to apply to no one but the person who files the entry with the collector of the port, and however that decision may be viewed, it is authority for the present proposition.

26 If the statute had, in that case, been held broad enough to include all persons actually making the entry, either through the filing of the entry by themselves or by some one at their direction, nevertheless a weigher, whose connection with the transaction was merely such as that of the defendant Mescall in this case, would not be one of the parties chargeable, or referred to by the words "such person" in the criminal portion of this statute.

The case of U. S. v. 1,150½ Pounds of Celluloid, 82 Fed., 627, while differing in some respects from U. S. v. One Silk Rug, supra, reviews a number of cases with reference to the forfeiture of goods under these sections and is additional authority for the proposition that the defendant Mescall is not included in the scope of the prohibitions of section 9.

The demurrers will be sustained.

THOMAS I. CHATFIELD, *U. S. J.*

27 At a stated term of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Judicial Circuit, held at the United States court-house, in the borough of Brooklyn, on the 28th day of July, in the year of our Lord one thousand nine hundred and eight.

Present: Hon. Thomas I. Chatfield, district judge holding the court.

UNITED STATES
vs.
SIMON J. MESCALL. } No. 753.

An indictment having been found by a grand jury of the United States in and for the Eastern District of New York against the defendant above named for a violation of section 9, chapter 407, Laws of 1890, which indictment was filed in the Circuit Court of the United States for the Eastern District of New York upon the 20th day of January, 1908, and the said Simon J. Mescall, having been duly arraigned in open court upon the said indictment and having filed a demurrer thereto and the said demurrer having come on for hearing before this court, now, after hearing Leo Oppenheimer, esq., in support of said demurrer, the defendant appearing by Eugene F. O'Connor, jr., his attorney, and after hearing William J. Youngs, esq., United States attorney in the Eastern District of New York, appearing for the United States in opposition thereto, it is, on motion of Eugene F. O'Connor, jr., attorney for the defendant,

Ordered that said demurrer be, and it is in all respects, sustained and the indictment herein dismissed.

THOMAS I. CHATFIELD, *U. S. J.*

(Endorsed:) Order. Filed and entered July 28, 1908.

28 United States Circuit Court, Eastern District of New York.

THE UNITED STATES OF AMERICA
against
SIMON J. MESCALL.

And now comes the United States of America, by its attorney, William J. Youngs, esquire, and complains that in the record and proceedings had in this cause, and in the judgment sustaining the defendant's demurrer to the indictment herein, and dismissing said indictment, manifest error hath happened as will appear in the assignment of errors herewith submitted.

Therefore the United States of America prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated 27th day of August, 1908.

WM. J. YOUNGS,
United States Attorney for the Eastern District of New York, and Attorney for Petitioner.

(Endorsed:) Petition for writ of error. Filed August 29, 1908.

29 United States Circuit Court, Eastern District of New York.

THE UNITED STATES OF AMERICA
against
SIMON J. MESCALL.

Afterwards, on the 27th day of August, 1908, comes the plaintiff, the United States of America, by William J. Youngs, United States attorney for the Eastern District of New York and attorney for the said plaintiff, and says that in the record and proceedings in the above-entitled action and upon the demurrer and argument thereto presented to this court for its determination and in the said determination there is manifest error in this, to wit:

1. That the court erred in sustaining the demurrer to the indictment herein.

2. That the court erred in not overruling the demurrer to the indictment herein.

3. That the court erred in not sustaining the indictment herein.

4. That the court erred in holding that the defendant, Mescall, was not in fact any of the persons within the contemplation of section 9, chapter 407, Laws of 1890, with relation to these particular importations, and can not be considered either an owner, importer, consignee, agent, or other person.

5. That the court erred in failing to hold that the defendant,
30 Mescall, was in fact a person within the contemplation of section 9, chapter 407, laws of 1890, with relation to these particular importations and should be considered either an owner, importer, consignee, agent, or other person.

6. That the court erred in holding that the defendant, Mescall, was not making or attempting to make an entry of the goods specifically set forth in the indictment.

7. That the court erred in failing to hold that the defendant, Mescall, was making or attempting to make an entry of the goods specifically set forth in the indictment.

8. That the court erred in holding that a weigher whose connection with the transaction was merely such as that of the defendant, Mescall, in this case would not be one of the parties chargeable or referred to by the words "such persons" in the criminal portion of this statute.

9. That the court erred in failing to hold that a weigher whose connection with the transaction was merely such as that of the defendant, Mescall, in this case would be one of the parties chargeable or referred to by the words "such persons" in the criminal portion of this statute.

10. That the court erred in holding that the defendant, Mescall, is not included in the scope of the provisions of section 9, chapter 407, laws of 1890.

11. That the court erred in failing to hold that the defendant, Mescall, is included in the scope of the provisions of section 9, chapter 407, laws of 1890.

31 12. That the court erred in holding that section 9, chapter 407, laws of 1890, was not broad enough to include all persons making the entry, either through filing of the entry by themselves or by some one at their direction.

13. That the court erred in failing to hold that section 9, chapter 407, laws of 1890, was broad enough to include all persons actually making the entry, either through filing of the entry by themselves or by some one at their direction.

14. That the court erred in holding that the statute, to wit, section 9, chapter 407, laws of 1890, does not provide for the case of all individuals who may assist in or have a fraudulent part in the making of an entry by some other person.

15. That the court erred in failing to hold that the statute, to wit, section 9, chapter 407, laws of 1890, does provide for the case of all individuals who may assist in or have a fraudulent part in the making of an entry by some other person.

16. That the court erred in holding that the words "owner, importer, consignee, agent, or other person," in section 9, chapter 407, laws of 1890, do not apply to an assistant weigher.

17. That the court erred in failing to hold that the words "owner, importer, consignee, agent, or other person," in section 9, chapter 407, laws of 1890, do apply to an assistant weigher.

18. That the court erred in holding that the words "owner, importer, consignee, agent, or other person," in section 9, chapter
32 407, laws of 1890, do not apply to the defendant, Mescall.

19. That the court erred in failing to hold that the words "owner, importer, consignee, agent, or other person," in section 9, chapter 407, laws of 1890, do apply to the defendant, Mescall.

20. That the court erred in holding that section 9, chapter 407, laws of 1890, applies to no one but the person who files the entry with the collector of the port.

21. That the court erred in failing to hold that section 9, chapter 407, laws of 1890, does apply to persons other than the person who files the entry with the collector of the port.

Wherefore the said plaintiff claims that the said judgment was unfounded in law, and prays that the order of July 28th, 1908, be vacated and set aside, and that the aforesaid judgment sustaining the demurrer be reversed and held for naught, and that this action be sent back to the Circuit Court with the direction that the demurrer herein be overruled and the case brought to trial upon the issues.

WILLIAM J. YOUNGS,
United States Attorney, Eastern District of New York, Federal Building, Brooklyn, N. Y.

(Endorsed:) Assignment of errors. Filed August 29, 1908.

33 UNITED STATES OF AMERICA,
Eastern District of New York, ss.

I, B. Lincoln Benedict, clerk of the Circuit Court of the United States for the Eastern District of New York, in the Second Judicial

Circuit, do hereby certify that the foregoing is a true transcript of the indictment, demurrer, opinion, order, and appeal papers, and of the whole thereof, made up to be transmitted to the Supreme Court of the United States, on writ of error of the United States, in the proceeding by indictment of the United States of America versus Simon J. Mescall (No. 3).

In witness whereof I have hereunto set my hand and the seal of this court the 21st day of September, 1908.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

34 *The President of the United States to the honorable the judges of the Circuit Court of the United States for the Eastern District of New York, in the Second Circuit, greeting:*

Because in the record and proceedings herein, as also in the rendition of judgment of a plea which is in the said Circuit Court of the United States for the Second Circuit in the Eastern District of New York, before you, or some of you, between the United States of America and Simon J. Mescall, a manifest error hath happened, to the great damage of the said The United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being submitted, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of August, in the year of our Lord one thousand nine hundred and eight.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States for the Eastern District of New York.

By J. G. COCHRAN, *Deputy Clerk.*

Allowed by THOMAS I. CHATFIELD, *United States District Judge in the Second Circuit.*

(Indorsed:) Crim. 4/117. United States Circuit Court, Eastern District of New York. The United States of America against Simon J. Mescall. No. 3. Calendar No. 753. Writ of error. William J. Youngs, United States attorney, Federal Building, Brooklyn, N. Y. Received and filed August 29, 1908.

35 *By the Honorable Thomas I. Chatfield, judge of the District Court of the United States for the Eastern District of New York, Second Circuit, to Simon J. Mescall, greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, District of Columbia, on the 28th day of September, A. D. 1908, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of New York, wherein the United States of America is appellant and you are appellee, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the city of New York, in the district and circuit above named, this 29th day of August, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

THOMAS I. CHATFIELD,
Judge of the District Court of the United States for the Eastern District of New York, Second Circuit.

36 (Indorsed:) Crim. 4/117. United States Circuit Court, Eastern District of New York. The United States of America against Simon J. Mescall. No. 3. Calendar No. 753. Citation. Received and filed August 31st, 1908. William J. Youngs, United States attorney, Federal Building, N. Y. Service of the within citation is admitted this 31st day of August, 1908. Eugene F. O'Connor, jr., atty. for dft.

37 (Indorsed:) United States Supreme Court. The United States of America versus Simon J. Mescall (No. 3). Record. Wm. J. Youngs, U. S. attorney; Eugene F. O'Connor, attorney for defendant. Writ of error from the Circuit Court of the United States for the Eastern District of New York.

38 (Indorsement on cover:) Office of the clerk, Supreme Court U. S. Received Oct. 31, 1908. File No. 21394. E. New York, C. C. U. S. Term No. 278. The United States, plaintiff in error vs. Simon J. Mescall. Filed October 31st, 1908. File No. 21394.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SIMON J. MESCALL. } No. 278.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The indictment in this case is drawn under section 9 of the Customs Administrative Act of June 10, 1890 (26 Stat., 135, 136). This section reads as follows:

> That if any owner, importer, consignee, agent, or *other person* shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the

> merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding $5,000 or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.

In the first count of the indictment it is alleged that the steamship *Alice* arrived in the port of New York on the 2d day of November, 1907, from Greece, having on board eighty cases of cheese consigned to one S. P. Stamatopoulos; that said cheese was unloaded and an invoice and entry thereof were filed with the collector of customs of the port of New York by the said Stamatopoulos. That Mescall was at that time an assistant weigher in the customs service of the United States at the port of New York, and was engaged in the performance of his duties as such assistant weigher; that it was his duty to weigh accurately said cheese and make return thereof to the collector of customs, and upon the weights so returned the entry of said cheese was to be liquidated. But that said Mescall did—

> knowingly, wilfully, and unlawfully make and attempt to make an entry of imported mer-

> chandise, to wit, the said eighty cases of cheese, *by means of a false and fraudulent practice*, by means whereof the United States was to be deprived of the lawful duties and the portion thereof accruing upon the said merchandise;

and that said Mescall knowingly, wilfully, and unlawfully returned the net weight of said cheese as 10,658 pounds, whereas the true weight thereof, and the weight upon which the entry should have been liquidated and the duties paid, was 17,577 pounds. (R., pp. 1–3.)

The second and third counts contain the same statement of facts, but it is alleged in the second count that Mescall was guilty of a *wilful act and omission*, by means whereof the United States was to be deprived of the lawful duties on a portion of said cheese (R., p. 4); and in the third count it was alleged that he unlawfully made and attempted to make the entry *by means of a false written statement* (R., pp. 4–6).

To this indictment a demurrer was filed assigning nine reasons why the indictment was fatally defective. (R., p. 8–9.) This demurrer was sustained, the reason for sustaining the same being thus stated in the opinion of the court:

> But it is apparent from the allegations of the indictment that the defendant is not in fact any of the persons within the contemplation of section 9 with relation to these particular importations, and can not be considered either an owner, importer, consignee, agent, or other person.

> The defendant Mescall was not making or attempting to make an entry of these goods. According to the charge he was, contrary to his duty, rendering assistance to the importer, who was the "person" making the entry. The statute does not provide for the case of all individuals who may assist or have a fraudulent part in the making of an entry (in either sense of the word) by some other person. In fact, in the recent case of *U. S.* v. *One Silk Rug*, decided by the Circuit Court of Appeals in the Third Circuit (Treasury Decisions, 28799), section 9 has been held to apply to no one but the person who files the entry with the collector of the port, and however that decision may be viewed, it is authority for the present proposition.
>
> If the statute had in that case been held broad enough to include all persons actually making the entry, either through the filing of the entry by themselves or by some one at their direction, nevertheless a weigher, whose connection with the transaction was merely such as that of the defendant Mescall in this case, would not be one of the parties chargeable or referred to by the words "such person" in the criminal portion of this statute. (R., p. 13.)

It thus appears that the demurrer was sustained and the indictment quashed solely upon the ground that the statute quoted does not make it unlawful for a government weigher to knowingly, wilfully, and unlawfully underweigh imported merchandise and return such underweight to the collector, in order that the Government may be deprived of a por-

tion of the revenue thereon; the reason given by the court being *that in performing such act the weigher is not making an entry of the goods, but is only assisting the importer in making the entry, and that the statute does not apply to one who is rendering assistance of that character to the importer.*

The case has been removed to this court by writ of error under the act of March 2, 1907 (34 Stat., 1246), which provides that a writ of error may be taken on behalf of the United States from a District or Circuit Court of the United States direct to the Supreme Court of the United States in a criminal case wherein there has been a decision or judgment rendered sustaining a demurrer to an indictment, when such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is found.

BRIEF AND ARGUMENT.

The judgment of the court below in quashing the indictment should be reversed for the following reasons:

I.

The court erred in holding that Mescall did not make or attempt to make the entry of the eighty cases of cheese, within the meaning of said section 9 of the act of July 24, 1897.

The court erred in so holding for the following reasons:

1. *An entry of goods within the meaning of said statute, embraces the entire transaction, from the time the vessel enters port, until the importer obtains an en-*

trance of his goods into the body of the merchandise of the United States.

This proposition is manifestly correct from the language of the statute itself, because it not only mentions false invoices, affidavits, letters, papers, etc., but also embraces a false entry made—

> by means of any false or fraudulent *practice or appliance whatsoever,*

which must necessarily refer to any method or appliance, the use of which will reduce the weight of the goods and thus lessen the duties thereon. This construction has been adopted by the courts in the following cases:

In *United States* v. *Baker*, Fed. Case No. 14500, (24 Fed. Cases, 953), wherein an action was brought for the forfeiture of goods under a statute containing provisions almost identical to those set out in this statute, Judge Blatchford in charging the jury, said:

> Therefore, upon the second count of the declaration, if you shall believe that at any time after the making of the original entry for warehouse, there was, in connection with any withdrawal entry, or at any stage, down to and including the final payment of the duties which were paid upon these goods, any bribing of the weigher by the defendants, with the intent of procuring a false return by him, and that the false return was procured, whereby the Government received less duties on the goods than it ought to have received, then the charge in the second count of the declaration is made out (p. 957).

In *United States* v. *Cargo of Sugar*, Fed. Case No. 14722 (25 Fed. Cases, 288), Judge Hoffman held that a like statute included the series of acts necessary to the introduction of the merchandise into the United States in compliance with the laws.

In *United States* v. *Legge* (105 Fed., 930, 933) the Circuit Court of Appeals for the Second Circuit cited the opinion of Judge Hoffman in said case of *United States* v. *Cargo of Sugar*, and referring to the statute under which the action was brought, said:

> Manifestly, the word "entry" in such statute referred to the entire transaction of passing the goods through the custom-house.

2. *If the entry of goods within the meaning of the statute refers to the entire transaction by which the imported goods are introduced into the commerce of the country, then it necessarily follows that every person who performs any material act in accomplishing that object, assists in making the entry, and that whoever in performing any such act violates the statute in either of the particulars designated therein, is liable to prosecution therefor.*

As above shown, the court below was of the opinion that the defendant was only aiding in making the unlawful entry, and could not, therefore, be prosecuted as a principal.

In so holding the court was in error for two reasons:

(*a*) Under the allegation of the indictment, the defendant was performing an act independent of the importer, an act which was essential to a correct liquidation of the duties upon the merchandise,

one more essential in fact than a delivery of the correct invoice to the collector by the importer; and it was in consequence of this act alone that the false and fradulent liquidation was made. He was, therefore, in every sense a principal, and could not be regarded as a mere aider any more than one who knowingly and wilfully delivers to the collector a false invoice or affidavit or other paper designated in the statute, which results in a false and fradulent liquidation of the duties.

(*b*) *The offense created by the statute is not a felony, but a misdemeanor.*

The penalty prescribed for a violation of the statute is a fine not exceeding $5,000, or imprisonment not exceeding two years, or both, in the discretion of the court, but the statute does not designate the offense as either a felony or a misdemeanor. The offense in question did not, of course, exist at common law, and is one which found its origin in this statute, or a previous statute in lieu of which this section was enacted. It is well settled that an offense which is not a felony at common law, and which is not made a felony by the act of Congress declaring it an offense against the laws of the United States, must be considered a misdemeanor. This question is fully discussed and settled in the following authorities:

Bannon v. *United States*, 156 U. S., 464.
Considine v. *United States*, 112 Fed., 342 (C. Ap., 6 Cir.; Op. by Mr. Justice Day).

United States v. *Falkenhainer*, 21 Fed., 624 (Op. by Mr. Justice Brewer).
United States v. *Coppersmith*, 4 Fed., 198.
1 Bishop New Criminal Law, sec. 617a.
12 Cyc., 131.

It is equally well settled that there are no aiders and abettors in misdemeanors, but that all who are connected with offenses of this character must be indicted as principals. This rule applies even to accessories, and is thus stated in Bishop's New Criminal Law, section 685:

> The authorities agree that in misdemeanor there are no accessories either in name or in the order of the prosecution. When, therefore, one sustains in misdemeanor a relation which in felony makes an accessory before the fact, if what he does is of sufficient magnitude, he is to be treated as a principal; the indictment charges him as such, and unless the pleader chooses to make the allegation in the accessorial form, as he may, it does not mention that the act was through another; and he may be proceeded against either in advance of the doer or afterwards, or jointly with him.

Since, therefore, the act done by the defendant was a material one in making the entry of the merchandise in question, he was properly charged in the indictment as a principal.

II.

The statute is directed against "any owner, importer, consignee, agent, or other person" who shall make or attempt to make a false entry in the manner described therein, and it is insisted on behalf of Mescall that he is not embraced within the meaning of the term "other person" as used in said act, and that for this reason the indictment is not good.

This contention can not be here maintained for two reasons:

1. *The court below held that defendant is embraced within the meaning of said expression, and that question therefore is not before and can not be considered by this court.*

The discussion of this question by the lower court in its opinion is as follows:

> The defendant, however, has demurred to these indictments upon the additional ground that section 9 applies to no person except one who can be considered as within the class of "owners, importers, consignees, agents." It is argued that no "assistant weigher" in the customs service can be brought within this class, without construing the words "other person" to mean "any person whatever." This is an unnecessary attempt at straining the construction of the statute. An assistant weigher or any individual who came within the scope of the provisions of the section, in the sense of making or attempting to make an entry, would certainly be within the class of "owners, importers, consignees, agents, and other persons" referred to in the statute. (R., p. 12.)

That this court can not consider any question in a case removed from a lower court by writ of error under the act of March 2, 1907, except such as was decided adversely to the Government by the court below, is conclusively settled in the case of *United States* v. *Keitel* (211 U. S., 370, 398). In speaking of the purpose of that act, the court said:

> That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case.
>
> We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reexamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

If, therefore, the court below erred in overruling this ground of demurrer, in case defendant be tried

and convicted he has his remedy by appeal to the Circuit Court of Appeals.

2. *Defendant is in fact embraced within the meaning of the term "other person" as used in said section 9 of the act of June 10, 1890.*

The persons to which the section applies are, according to its language, "any owner, importer, consignee, agent, *or other person;*" but defendant insists that the expression "other person" can include no one who is not an importer or some one acting as a representative of the importer.

This contention is not maintainable, for the following reasons:

(1) *The legislation upon this subject shows that the words "other person" are not to be limited to persons embraced in the words preceding, to wit, "owner, importer, consignee, agent."*

A provision of this character first appeared in the act of March 3, 1853 (12 Stat., 738), and the persons there mentioned were owners, consignees, and agents, the general term "other person" being omitted. The language was so changed by section 12 of the act of June 22, 1874 (18 Stat., 188), as to make it provide that "any owner, importer, consignee, agent, *or other person*" who, with intent to defraud the revenue, should make or attempt to make an entry of merchandise by means of any fraudulent or false invoice, etc., should be guilty of an offense. The same language as to the persons against whom the act was directed is retained in the tariff law of 1897, but the phrase "with intent to defraud the revenue" was eliminated.

The very fact that the words "other person" were added in the later acts, when they did not appear in the act in which this provision originated, is conclusive evidence that Congress intended to include persons of other classes than those mentioned in the preceding words; and when it be admitted that its meaning extends to other persons, no line of limitation can be drawn, and the phrase must include all other persons.

(2) *To hold that defendant does not fall within the meaning of the words "other person," as used in the statute, would be to deprive said words of all meaning, and the doctrine of* EJUSDEM GENERIS *must yield to the rule of construction, that every word in a statute should be given some meaning.*

It is apparent that the entire genus is exhausted by the enumeration in the preceding words. It can not be conceived how anyone who is interested or in any way connected with the importation of merchandise could fall without all the terms "owner," "importer," "consignee," or "agent." Then to restrict the meaning of the phrase "other person" to those who are in some way interested in the importation is to deprive it of all meaning whatever. This is contrary to the well-settled rule of statutory construction.

In 2 Lewis's Suth. Stat. Const. (2 ed.), pages 833–835, it is said:

> The doctrine of *ejusdem generis* yields to the rule that an act should be so construed as to carry out the object sought to be accom-

plished by it, so far as that object can be collected from the language employed. "But the doctrine of *ejusdem generis*," says the supreme court of Minnesota, "is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors." So the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, the general words must refer to some larger genus. "If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose." The general words are not to be rejected, and the maxim of *ejusdem generis* must yield to the maxim that every part of a statute should be upheld and given its appropriate effect, if possible. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention.

In 26 Cyc., p. 610, it is said with reference to the rule of *ejusdem generis:*

> Nor does it apply when the particular words exhaust a whole genus; in that case the general term is held to refer to a larger class.

One of the best settled principles relating to the doctrine of *ejusdem generis* is that general words following particular words will not include any of a class superior to that to which the particular words belong, yet this rule must give way to the other principle that words in a statute must when possible be given some meaning. (2 Lewis's Suth. Stat. Const., p. 831.)

(3) *The principle of* EJUSDEM GENERIS *is used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention of or of confining the operation of a statute within narrower limits than was intended by the lawmaker.*

To illustrate the foregoing principles the court's attention is called to the following cases:

In *The State ex rel.* v. *Corkins* (123 Mo., 56, 67) the validity of the charter of a private corporation organized for profit was attacked on the ground that it was not authorized by statute. After particularly designating ten purposes for which corporations could be created, it was provided:

> Eleventh, for any purpose intended for pecuniary profit or gain not otherwise especially provided for, and not inconsistent with the constitution and laws of this State.

It was insisted that this general provision was restricted to the purposes especially enumerated in the preceding clauses, and did not authorize the creation of a corporation for the purpose of issuing bonds to be paid for by purchasers thereof in monthly installments, and to be redeemed by the corporation in such order and at such times as might be prescribed by it. The court overruled this contention, holding that—

> rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, and "not for the purpose of controlling the intention or confining the operation of a statute within narrower limits than was intended by the lawmaker."

In *National Bank of Commerce* v. *Ripley* (161 Mo., 126, 131, and 132), the statute under consideration provided, with reference to the winding up of insolvent estates—

> That any creditor who shall fail to lay his claim before said assignee during said term, on account of sickness, absence from the State, *or any other good cause*, may, at any time before the declaration of a final dividend, file and prove up his claim, and same may be allowed, and the remaining dividends paid thereon as in case of other allowed claims.

It was held that there could be other good causes than sickness and absence from the State, and that the fact that a bank had delayed filing its claim because it had undertaken to satisfy a note for $4,800 which it held against the insolvent parties at the time of their failure, by appropriating that

amount out of their deposits, which payment was disallowed in an action brought to test the question, was a good cause within the meaning of the statute. With reference to the rule of *ejusdem generis*, the court said:

> But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. It is a corollary to the first proposition above stated, that the statute must be construed to give effect to all its words. The rule itself must not be so construed as to defeat that purpose. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.

In *Willis* v. *Mabon* (48 Minn., 140, 156) the facts were that under the state constitution the stockholders of certain corporations were individually lia-

ble for the companies' debts to the amount of their stock. In an act creating a method for the discharge of insolvent corporations it was provided that—

> the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, *or otherwise*, for the same debt.

It was held that the word "otherwise" was not limited to the class mentioned in the preceding words, but embraced those liable under the constitutional provision, the court saying:

> But the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the lawmakers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors.

In *Winters* v. *City of Duluth* (82 Minn., 127), in the caption of an act requiring a preliminary notice of the bringing of certain actions, it was recited that it applied—

> to actions against cities, villages, or boroughs for damages to persons injured on streets *and other public grounds*, by reason of the negligence of any public officer, agent, or employee of any city, village, or borough.

It was held that the phrase "other public grounds" in the caption was not limited to public grounds of

the character of streets, and that the act was constitutional and applied to an injury received by an employee while working in a pumping station. The court said:

> But "canons of construction are not the masters of the courts, but merely their servants to aid them in ascertaining the legislative intent;" and when it is ascertained, the statute must be so construed as to give effect to such intention, even if it seem contrary to such rules and the strict letter of the statute.

In *Foster* v. *Blount* (18 Ala., 687, 689) the statute construed prohibited judges and clerks from receiving fees greater than the specified amounts from "any guardian, executor, or administrator *or other person.*" It was held that the application of the act was not limited to cases to which guardians, executors, or administrators were parties, or in which the administration of estates was involved, but that by the phrase "other person" it was extended to a case brought by the State in which the defendant was adjudged to pay the costs, the court holding that the principle of *ejusdem generis*—

> is but a rule of construction, by which courts are to ascertain the intention of the legislature, and when that is apparent, we are bound by it and can no more disregard the intention in the exposition of a penal statute than any other.

In *Misch* v. *Russell* (136 Ill., 22, 25) it was held that a statute which provided that the county court "shall hear and determine contests of election of all other county, township, and precinct officers, and all

other officers for the contesting of whose election no provision is made," conferred jurisdiction upon the county court to hear and determine contests of officers of school districts. The decision was rested mainly upon the ground that to limit the jurisdiction of the court to the classes of officers enumerated particularly would be to deprive the general expression of all meaning.

In *Webber* v. *City of Chicago* (148 Ill., 313, 316, 318) it was held that in an ordinance providing for the licensing and taxing of amusements, etc., the general expression—

> all other exhibitions, performances, and entertainments not here enumerated, given in a building, hall, or under canvas and other cover,

was not restricted by the enumeration of a large number of amusements, but applied to horse racing on an inclosed track, and that the rule of *ejusdem generis* should be disregarded in construing penal ordinances as well as those not penal, when the meaning of the ordinance required that it be disregarded.

In *Maxwell* v. *The People* (158 Ill., 248, 253) it was held that a statute which made it an offense to—

> obtain or attempt to obtain from any person or persons any money or property by means of or by use of any *false or bogus checks, or by any other means,* instrument, or device commonly called the confidence game,

included the obtaining of money by a device other than the use of false or bogus checks or commercial paper.

In *Gillock* v. *The People* (171 Ill., 307, 308) the statute construed declared it burglary to willfully enter a dwelling house, kitchen, office, etc., *or other building* with intent to commit a felony; and it was held that the phrase "other building" included a chicken house, though such house was not named in the specific enumeration. The court in its opinion quoted the following from Sutherland Stat. Const.:

> For the same reason the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, the general words must refer to some larger class.

In *Matthews* v. *Kimball* (70 Ark., 451, 463) it was held that a statute which provided that—

> The council of any city of the first or second class, or any incorporated town, may assess all real property within such city, or within any district thereof, for the purpose of grading or otherwise improving streets and alleys, constructing sewers *or making any local improvements* of a public nature,

authorized the making of an assessment for the improvement of public parks, though such purpose was not among those enumerated.

In *State* v. *Woodman* (26 Mont., 348, 353) it was held that a statute prohibiting the running of a "nickel-in-the-slot machine . . . for money, checks, credits, or any representative of value, *or for any*

property or thing whatever" prohibited the running of such a machine for the distribution of cigars. This conclusion was largely based on the fact that to restrict the effect of the statute to the classes of property particularly designated, would deprive the general expression of all meaning.

In *Randolph* v. *State* (9 Tex., 521, 523) the defendant was indicted for playing a game called "Rondo." The statute under which the indictment was drawn enumerated a number of games, but contained the general prohibition against "any other gaming table or bank," and "any other gambling device." It was held that the gam of "Rondo," though not particularly mentioned, was embraced in these general terms.

In *The State* v. *Solomon* (33 Ind., 450) it was held that in order to constitute a violation of a statute enacted for the protection of religious meetings the sale, not merely of articles specifically named in the statute, but of any other article, was sufficient.

In matter of *La Société Française*, etc. (123 Cal., 525, 530) the statute under consideration provided that—

> Any religious, benevolent, literary, scientific, *or other corporation*, or any corporation having for its name, or using or being known by the name of any benevolent or charitable order or society,

might on petition have its name changed. It was held that this statute was not to be construed as limiting the term "or other corporation" to corporations merely of the same kind with those specially enumer-

ated, but that it included private corporations for profit.

In *State* v. *Holman* (3 McCord (S. C.), 306) the defendant was indicted for pouring water into a bale of cotton. It was held that the general words "*matter or thing*" were not restricted to stone, wood, trash, cotton, or cotton seed, or things of a like nature. The court said:

> It is contended that "any matter or thing whatsoever," should be construed in reference to the preceding specifications. But the rule does not apply except where there is a repugnance or incompatibility between the specific and general expressions.

In *State* v. *Williams* (2 Strob. (S. C.), 474) it was held that an act which made it larceny for a person to—

> take from any field not belonging to such person any cotton, corn, rice *or other grain*, fraudulently with intent to convert the same,

included the taking of peas.

In *Tisdell* v. *Combe* (7 A. & E., 788, 792, 796) it was held that a statute which empowered the mayor and aldermen of London to make laws for the government of "the boats, vessels, and *other craft* to be rowed or worked within the limits of this act" included steamboats, though well known at that time and not specially mentioned.

In *Young* v. *Grattridge* (4 Q. B. Cases, 166) a statute which made one liable to a penalty who prevented the inspector "from entering any slaughterhouse, shop, building, market, *or other place*" where

a carcass was kept, was held to apply when the carcass was in a yard at the back of a butcher's house, though such place did not fall within either of the classes particularly mentioned.

In *Reg.* v. *Doubleday* (3 E. & E., 500) the statute before the court provided that a certain committee might require the "overseers of the poor, constables, assessors, collectors, and *any other persons whomsoever*" to appear before them, and it was held that the power was not restricted to calling the classes of persons particularly mentioned, but extended to all persons who were able to give material evidence.

It is insisted, therefore, that the general phrase "other person," as it appears in section 9 of the tariff act of 1897, must be given some meaning, and must include other persons than those particularly enumerated in the preceding words, and that the manifest legislative intent was that it should apply to every person, regardless of his occupation or connection with the importation, who should by means of any false or fraudulent practice or appliance whatsoever make or attempt to make a fraudulent entry, and that, therefore, the statute is applicable to the defendant Mescall, though he was at the time he made and returned the false weights, in the Government service.

Therefore the judgment of the court below should be reversed, and the case remanded to the Circuit Court for the Eastern District of New York for trial.

J. A. FOWLER,
Assistant Attorney-General.

OCTOBER, 1909.

O

Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES,
Plaintiff in Error,

against

SIMON J. MESCALL,
Defendant in Error.

No. 278.
Brief of
Defendant
in Error.

Statement.

This is a writ of error to the Circuit Court of the United States for the Eastern District of New York, to review a judgment of that court sustaining the defendant's demurrer to an indictment under Section 9, Chapter 407, Laws of June, 1890, known as the Customs Administration Act.

Defendant, an assistant weigher in the customs service of the United States, at the Port of New York, was indicted under this section for unlawfully making or attempting to make an entry of imported merchandise, to wit, eighty cases of cheese, by means of a false and fraudulent practice (Count 1, fol 3), a wilful act and omission (Count 2, fol. 7), false written statement (Count 3, fol. 12), by means whereof the United States was to be deprived of the lawful duties accruing upon merchandise.

The Statute.

Section 9, Chapter 407, Laws of June 10, 1890, known as the Customs Administration Act, under which defendant was indicted, reads as follows:

> "Section 9. (Penalty for making, etc., false entry).
>
> "That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates, and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years."

POINTS.

I.

Section 9 of the Customs Administrative Act, Laws of June 10, 1890, Chap. 407, is a penal statute and should be construed strictly.

United States vs. Seventy-five Bales of Tobacco, 147 Fed., 127.
Andrews vs. United States, 2 Story, 202.
United States vs. Wiltberger, 5 Wheat., 76.
United States vs. Eighty-four Boxes of Sugar, 32 U. S., 453.
Sutherland on Stat. Const., Section 353.

This Court has said, "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words, for it is well settled that such statutes must be construed strictly."

United States vs. Morris, 14 Peters, 464.

Such a statute should be construed according to the manifest import of the words. They should not be extended beyond their obvious meaning by strained inferences. The plain intent of the statute should not be defeated.

If the statute is ambiguous, the construction adopted should be that most favorable to the accused.

The Schooner Enterprise, 1 Paine, 32.
Sutherland on Stat. Const., Section 353.

II.

Under Section 9 indictments may not be brought against others than owners, importers, consignees, agents or other persons of the same class.

It will be observed that the marginal title of the Act, Section 9, Chapter 407, Laws of 1890, is as follows: "Penalty for making, etc., false entry." From that it would seem, without further reading, that the section applies only to those who have to do with the entry and not to weighers in the customs service. The entry contemplated undoubtedly being the entry originally made by the importer, or some one on his behalf, as required by the rules and regulations of the customs service. This was the entry alluded to in the act of June 22, 1874, Section 21 (18 Stat., 190), and it was the entry provided for, regulated and defined by Sections 2785-2790, inclusive, of the Revised Statutes.

United States vs. Seidenberg, 17 Fed., 227.

Whether this is the entry contemplated by the statute or whether it is the entire transaction by which the importer obtains the entrance of his goods, seems immaterial, because no one but the importer or some one representing him, has a right to enter goods at the custom house.

This Court has said that "No person but the owner or original consignee, or in his absence or sickness his agent or factor, is entitled to enter goods at the Customs House and give bond for the duties and pay the duties."

Harris vs. Dennie, 28 U. S., 292.

In the case of United States vs. One Silk Rug (158 Fed., 974), it was held that Section 9 did not apply to anyone but the person who files the entry with the collector.

In the case of United States vs. Ninety-nine Diamonds (132 Fed., 579, 139 Fed., 961), it was held that an importer who had goods on consignment should be considered the owner, and might declare as owner. There seems to have been no doubt in the mind of the Court, but that Section 9 referred solely to an owner, importer or someone of the same class.

In the case of United States vs. 1,150½ Pounds of Celluloid (82 Fed., 627), it was held that the words "or other person" mean some one of the same general class as those described by the preceding words, and in order to enforce a forfeiture under Section 9, it is necessary that the acts made a ground of forfeiture shall be done by the owner, or some one for whom he is responsible or under whom he derives title.

It seems to us that the principal dispute that can arise in the case at bar is as to the meaning of the words "or other person."

The decision in the case of United States vs. 1,150½ Pounds of Celluloid (82 Fed., 627), that these words "or other person" mean some one of the same general class as those described by the preceding words, seems to be correct. It is certainly supported by the great weight of authorities.

This limitation of Section 9 to importers or other persons of the same class is further emphasized by the opening words of the section "If any owner, importer, consignee, agent or other person." These are the only words descriptive of the parties contemplated by the law. If these words are to include an assistant weigher, they can only be made

to do so by construing "or other person" to mean "or other person whosoever."

The rule of construction to be applied to such phraseology has long been known as Lord Tenderden's Rule, which has been stated as follows:

> "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces other persons or things, the word "other" will generally be read as "other such like", so that persons or things therein comprised may be read as *ejusdem generis* with and not of a class superior to or different from those specifically enumerated."

American & Eng. Encyc. of Law Title "Other", Vol. 21, page 1012.

In re Davidson, 4 Fed. Rep., 509.

Crystal Spring D. Co. vs. Cox, 49 Fed., 555.

Newport News Company vs. U. S., 61 Fed., 488.

U. S. vs. 1,150½ Pounds of Celluloid, 82 Fed., 636.

Crowther vs. Fidelity Ins. Co., 85 Fed., 41.

Alabama vs. Montague, 117 U. S., 602.

In the case of State vs. McGarry (21 Wisc., 502), where there was power to remove for incompetency, improper conduct "or other cause satisfactory to the board", the words "other cause" were held to mean other "kindred" cause.

Sedgwick in his work on the Construction of Statutes, page 361, states the rule as follows: "Where general words follow particular words, the rule is to construe the former as applicable to the persons or things particularly mentioned."

It seems perfectly obvious that this is the rule of construction to be applied in the case at bar, because if the intention of Congress had been otherwise, it would never have taken the trouble to enumerate so many persons of the same class.

The rule that general words will be restrained to things of the same kind with those particularized, has been applied in numerous cases.

East Oakland vs. Skinner, 94 U. S., 255.
White vs. Ivey, 34 Ga., 186.
State vs. McGarry, 21 Wisc., 502.
McIntyre vs. Ingraham, 35 Miss., 25.
Bucher vs. Commonwealth, 103 Pa. St., 528.
Matter of Hermance, 71 N. Y., 481.
Renick vs. Boyd, 99 Pa. St., 555.
People vs. N. Y., etc., R. Co., 84 N. Y., 565.
Sullivan's Appeal, 77 Pa. St., 107.
People vs. Richards, 108 N. Y., 137.
Sutherland on Stat. Const., Sections 268-277.

In Bucher vs. Commonwealth (103 Pa. St., 528), it was held that the words "other persons" following in a statute the words "warehousemen" and "wharfinger" must be understood to refer *ejusdem generis*, viz: those who are engaged in a like business.

In the light of this well established rule, it is contended that the statute cannot be invoked against an assistant weigher in the revenue service. Especially so as the means by which the entry shall be made are none of them such as an assistant weigher may make use of.

It is respectfully submitted that the Court below did not err in holding that defendant was not one of the persons within the contemplation of this statute, and that, therefore, the demurrer to the indictment was properly sustained.

III.

No errors are presented for this Court to correct.

(*a*) The Court below did not err in holding that the defendant was not in fact one of the persons within the contemplation of Section 9, with relation to these importations and cannot be considered either as owner, importer, consignee, agent or other person.

United States vs. 1,150½ Pounds of Celluloid, 82 Fed., 627.
Harris vs. Dennie, 28 U. S., 292.
United States vs. One Silk Rug, 158 Fed., 974.

(*b*) The Court did not err in holding that a weigher whose connection with the transaction was merely such as the defendant in this case, would not be one of the persons chargeable or referred to by the words "such person" in the criminal portion of the statute.

The defendant, an assistant weigher, could not be considered either an owner, importer, consignee or other person entitled to make an entry of goods at the custom house. He was not in fact making or attempting to make an entry of goods. It was the importer who was making the entry, and the words "such person" in the statute referred solely to the importer in the case at bar. Furthermore, the mere reading of the statute shows that the words "such person" refers solely to the preceding words "the person making the entry."

(*c*) The Court did not err in holding that the defendant was not making or attempting to make

an entry of the goods specifically set forth in the indictment.

The defendant, an assistant weigher, was not making or attempting to make an entry of the goods. He could not do so if he wished, because no person other than the owner or original consignee, or in his absence or sickness, his agent or factor is entitled to enter goods at the Custom House.

(*d*) The Court did not err in holding that the defendant is not included in the scope of the provisions of Section 9, because this section is limited to importers, owners, consignees, agents, factors, or other persons of the same class. The descriptive words preceding the words "or other person" all describe some person having a relation to the owner, and for whose conduct in respect to the merchandise he may be responsible.

> United States vs. 1,150½ Pounds of Celluloid, 82 Fed., 627.

(*e*) The Court did not hold that Section 9, Chapter 407, Laws of 1890, was not broad enough to include all persons making the entry, either through filing of the entry by themselves or by someone at their direction, therefore the twelfth and thirteenth assignments of error (fol. 31), are not in accordance with the law as laid down by the Court below.

What the Court said with reference to this in the opinion, is as follows:

> "If the statute had, in that case, been held broad enough to include all persons actually making the entry, either through the filing of the entry by themselves or by some one at their direction, nevertheless a weigher whose connection with the transaction was merely such as that of the defendant Mescall in this case,

> would not be one of the persons chargeable or referred to by the words 'such person' in the criminal portion of the statute."

(*f*) The Court did not err in holding that the statute, Section 9, Chapter 407, Laws of 1890, does not provide for the case of all individuals who may assist, or have a fraudulent part in the making of the entry by some other person.

The statute itself shows plainly that it refers solely to "the person making the entry." In the present case this person was the importer and the Court properly so held.

(*g*) The Court did not err in holding that the words "owner, importer, consignee, agent or other person" in Section 9, do not apply to an assistant weigher, and the Court did not err in holding that these words did not apply to the defendant.

(*h*) The Court did not err in holding that Section 9 applies to no one but the person who files the entry with the collector of the port.

We have considered all the assignments of error. They do not present any error to be corrected by this Court, because Section 9 refers solely to an owner, importer, consignee, agent or other person of the same class and because no other person but the owner or consignee or some one representing them could make or attempt to make a valid entry of the goods.

There is no reason why Section 9 should be construed to apply to defendant, an assistant weigher, because he has been indicted under Section 5444 of the United States Revised Statutes, which section applies to "every officer of the revenue"; he has been indicted under Section 5445 of the United States Revised Statutes, and has been indicted, tried before a jury, and acquitted under Section 5440 of the United States Revised Statutes.

For all these reasons it seems clear that no errors are presented for this Court to correct, and that the demurrer to the indictment was properly sustained.

IV.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

GEORGE F. HICKEY,
Of Counsel for Defendant-in-Error.

UNITED STATES *v.* MESCALL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 278. Argued October 14, 1909.—Decided November 8, 1909.

The rule of *ejusdem generis*, that where the particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described, is only a rule of construction to aid in arriving at the real legislative intent and does not override all other rules. When the particular words exhaust the genus the general words must refer to words outside of those particularized.

Under § 9 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, 135, providing punishment for making and aiding in false entries, the words "owner, importer, consignee, agent or other person" include a weigher representing the Government, and his acts come within the letter and purpose of the statute.

SECTION 9, chapter 407, Laws of June 10, 1890, 26 Stat. 130-135, known as the Customs Administrative Act, under which defendant was indicted, reads as follows:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture

shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The indictment in the first count alleges that the steamship Alice arrived at the port of New York on November 2, 1907, from Greece, having on board eighty cases of cheese, consigned to one Stamatopoulos; that the said cheese was unloaded and an invoice and entry thereof filed with the collector of customs of the port of New York by the said Stamatopoulos; that the defendant was at the time an assistant weigher of the United States in the customs service at the port of New York and engaged in the performance of his duties as such assistant weigher; that it was his duty to weigh accurately the said cheese and make return thereof to the collector of customs, and upon the weight so returned the said entry was to be liquidated; that the said defendant "did knowingly, wilfully and unlawfully make and attempt to make an entry of imported merchandise, to wit, the said eighty cases of cheese, by means of a false and fraudulent practice, by means whereof the United States was to be deprived of the lawful duties or a portion thereof accruing upon the said merchandise;" that he did knowingly, wilfully and unlawfully return the net weight of said cheese as 13,358 pounds, whereas the true weight thereof and the weight upon which the entry should have been liquidated and the duties paid was 17,577 pounds. The second and third counts contain the same statement of facts, but it is averred in the one that the defendant was "guilty of a wilful act and omission, by means whereof the United States was to be deprived of the lawful duties," or a portion thereof, and in the other that he unlawfully made and attempted to make the entry "by means of a false written statement." To this indictment a

demurrer was filed and sustained, the court, after discussing several matters, saying:

"But it is apparent from the allegations of the indictment that the defendant is not in fact any of the persons within the contemplation of section 9 with relation to these particular importations, and cannot be considered either an owner, importer, consignee, agent or other person.

"The defendant Mescall was not making or attempting to make an entry of these goods. According to the charge he was, contrary to his duty, rendering assistance to the importer, who was the 'person' making the entry."

The case is here under the act of March 2, 1907, 34 Stat. 1246, which authorizes a writ of error "direct to the Supreme Court of the United States" in a criminal case wherein there has been a decision or judgment sustaining a demurrer to an indictment, when such decision or judgment is based upon the invalidity or construction of a statute upon which the indictment is founded.

Mr. Assistant Attorney General Fowler for the United States:

An entry of goods within the meaning of § 9 of the act of July 24, 1897, embraces the entire transaction from the time the vessel enters port until the importer obtains an entrance of the goods into the body of merchandise in the United States; *United States* v. *Baker*, 24 Fed. Cas. 953; *United States* v. *Cargo of Sugar*, 25 Fed. Cas. 288; *United States* v. *Legge*, 105 Fed. Rep. 930; and every person performing any material act in accomplishing that purpose and violating the statute in any particular is liable to prosecution therefor.

One who is not an importer is not excluded from prosecution because under the rule of *ejusdem generis* the words "other person" exclude those not of the class of importer. 2 Lewis' Suth. Stat. Const., 2d ed., p. 833; 26 Cyc. 610; *State* v. *Corkins*, 123 Missouri, 56, 67; *Bank* v. *Ripley*, 161 Missouri, 126, 131; *Willis* v. *Mabon*, 48 Minnesota, 140, 156; *Winters* v. *Duluth*, 82 Minnesota, 127; *Foster* v. *Blount*, 18 Alabama, 687;

Misch v. *Russell*, 136 Illinois, 22, 25; *Webber* v. *Chicago*, 148 Illinois, 313; *Maxwell* v. *People*, 158 Illinois, 248, 253; *Gillock* v. *People*, 171 Illinois, 307; *Matthews* v. *Kimball*, 70 Arkansas, 451, 463; *State* v. *Woodman*, 26 Montana, 348, 353; *Randolph* v. *State*, 9 Texas, 521; *State* v. *Solomon*, 33 Indiana, 450; *Matter of La Société Française*, 123 California, 525, 530; *State* v. *Holman*, 3 McCord (So. Car.), 306; *State* v. *Williams*, 2 Strob. (So. Car.) 427; *Tisdell* v. *Combe*, 7 A. & E. 788, 792, 796; *Young* v. *Grattridge*, 4 Q. B. Cases, 166; *Reg.* v. *Doubleday*, 3 E. & E. 500.

Mr. George F. Hickey for defendant in error:

Section 9 of the Customs Administrative Act is a penal statute and should be construed strictly. *United States* v. *Seventy-five Bales of Tobacco*, 147 Fed. Rep. 127; *Andrews* v. *United States*, 2 Story, 202; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Eighty-four Boxes of Sugar*, 7 Pet. 453; Sutherland on Stat. Const., § 353.

In expounding a penal statute the court will not extend it beyond the plain meaning of its words. *United States* v. *Morris*, 14 Pet. 464.

Such a statute should be construed according to the manifest import of the words.

If the statute is ambiguous, the construction adopted should be that most favorable to the accused. *The Schooner Enterprise*, 1 Paine, 32.

Under § 9 indictments may not be brought against others than owners, importers, consignees, agents or other persons of the same class.

The entry contemplated undoubtedly is the entry originally made by the importer, or some one on his behalf, as required by the rules and regulations of the customs service. This was the entry alluded to in the act of June 22, 1874, § 21, 18 Stat. 190, and it was the entry provided for, regulated and defined by §§ 2785–2790, Rev. Stat. *United States* v. *Seidenberg*, 17 Fed. Rep. 227.

No one but the importer or some one representing him, has a right to enter goods at the custom house. *Harris* v. *Dennie*, 3 Pet. 292; *United States* v. *One Silk Rug*, 158 Fed. Rep. 974; *United States* v. *Ninety-nine Diamonds*, 132 Fed. Rep. 579; 139 Fed. Rep. 961.

It seems to us that the principal dispute that can arise in the case at bar is as to the meaning of the words "or other person."

The decision in the case that the words "or other person" mean some one of the same general class as those described by the preceding words, seems to be correct. It is certainly supported by the great weight of authorities. *United States* v. *1,150½ Pounds of Celluloid*, 82 Fed. Rep. 627.

The words "or other person" cannot be construed to mean "or other person whosoever."

For cases in support of this rule of construction, known as Lord Tenderden's Rule, see 21 American & Eng. Ency. of Law, title "Other," 1012; *In re Davidson*, 4 Fed. Rep. 509; *Crystal Spring D. Co.* v. *Cox*, 49 Fed. Rep. 555; *Newport News Co.* v. *United States*, 61 Fed. Rep. 488; *Crowther* v. *Fidelity Ins. Co.*, 85 Fed. Rep. 41; *Alabama* v. *Montague*, 117 U. S. 602; *State* v. *McGarry*, 21 Wisconsin, 502. Sedgwick on Const. of Stat. 361, states the rule as follows:

"Where general words follow particular words, the rule is to construe the former as applicable to the persons or things particularly mentioned."

The rule that general words will be restrained to things of the same kind with those particularized, has been applied in numerous cases. *East Oakland* v. *Skinner*, 94 U. S. 255; *White* v. *Ivey*, 34 Georgia, 186; *McIntyre* v. *Ingraham*, 35 Mississippi, 25; *Bucher* v. *Commonwealth*, 103 Pa. St. 528; *Matter of Hermance*, 71 N. Y. 481; *Renick* v. *Boyd*, 99 Pa. St. 555; *People* v. *N. Y. R. Co.*, 84 N. Y. 565; *Sullivan's Appeal*, 77 Pa. St. 107; *People* v. *Richards*, 108 N. Y. 137; Sutherland on Stat. Const., §§ 268, 277.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

It appears that the trial court sustained the demurrer on the ground that, as to the offense charged, the statute, properly construed, does not include the defendant. The case is, therefore, one which may be brought to this court. *United States* v. *Keitel*, 211 U. S. 370. But our inquiry is limited to the particular question decided by the court below. *Id.* 398.

Counsel for defendant invokes what is sometimes known as Lord Tenderden's Rule, that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*. The particular words of description, it is urged, are "owner, importer, consignee, agent." The general term is "other person," and should be read as referring to some one similar to those named, whereas the defendant was not owner, importer, consignee, or agent or of like class with either. He was not making or attempting to make an entry. He represented the Government, and, contrary to his duties, was rendering assistance to the consignee who was making the entry. But, as said in *National Bank of Commerce* v. *Ripley*, 161 Missouri, 126, 132, in reference to the rule:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. . . . Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning

outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

See also *Gillcock* v. *The People*, 171 Illinois, 307, and the cases cited in the opinion; *Winters* v. *Duluth*, 82 Minnesota, 127; *Matthews* v. *Kimball*, 70 Arkansas, 451, 462. Now the party who makes an entry, using the term "entry" in its narrower sense, is the owner, importer, consignee or agent, and it must be used in that sense to give any force to the argument of counsel for defendant, but used in that sense the term "other person" becomes surplusage. In § 1 of chap. 76, Laws of 1863, 12 Stat. 738, is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is "owner, consignee or agent." This was changed by § 12, chap. 391, Laws 1874, 18 Stat. 188, to read "owner, importer, consignee, agent, or other person," and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase "other person" was intended to include persons having a different relation to the importation than the owner, importer, consignee or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee or agent, or else the term "other person" was a meaningless addition. Now the defendant was a person, other than the owner, importer, consignee or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose, and the intent of Congress in the legislation is the ultimate matter to be determined.

The fact that he could not be punished in all respects as fully as the owner, in that he had no goods to be forfeited, is immaterial. *United States* v. *Union Supply Company*, decided this day, *post*, p. 50.

We are of opinion, therefore, that the trial court erred in sustaining the demurrer. The judgment is reversed and the case remanded for further proceedings.